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In The

Supreme Court of the United States

October Term, 1991

STATE OF MONTANA,

Petitioner,

v.

DONALD G. IMLAY,

Respondent.

On Writ Of Certiorari To The Montana Supreme Court

BRIEF SUBMITTED BY THE STATE OF VERMONT ON BEHALF OF THE STATES OF ALASKA, ARIZONA, DELAWARE, KANSAS, KENTUCKY, LOUISIANA, MICHIGAN, NEVADA, NEW JERSEY, NORTH CAROLINA, OHIO, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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Interest of Amici Curiae

The State of Vermont, and the other *amici* states and commonwealths, through their respective Attorneys General, appear on behalf of their citizens and file this brief pursuant to Rule 37 of the rules of this Court. The *amici curiae* administer criminal justice systems within their jurisdictions to promote the safety and welfare of their citizens. The decision of the Montana Supreme Court takes an expansive view of the

right against self-incrimination stated in the Fifth Amendment of the United States Constitution. The broad application of the right against self-incrimination as expressed by the Montana Supreme Court requires the displacement of general health principles in the treatment of sex offenders in favor of a strict application of the protection from self-incrimination applicable in criminal proceedings. The decision misconstrues the essentially civil nature of probation proceedings by focusing solely on the theoretical criminal sanctions imposable on offenders who must answer relevant state inquiries in out-patient treatment programs required as a condition of probation. The failure by the Montana Supreme Court to properly address the essential purpose of the Fifth Amendment threatens to undercut the integrity of the decisions of this Court by endorsing an impermissible standard of analysis for Fifth Amendment issues. The decision also fails to preserve the concept of federalism acknowledged by this Court in prior decisions by penalizing the State of Montana's effort to address sex offender treatment.

STATEMENT

The respondent was convicted by jury against his plea for the offense of sexual assault in the District Court of Montana. (Pet. App. 2a). Following conviction, the respondent was sentenced to five years in the Montana State Prison, all suspended but 35 days. (Pet. App. 2a). The court imposed a number of conditions of probation, including the condition that the respondent enroll in and complete a sexual therapy program at his own expense. (Pet. App. 2a). The respondent was placed on formal supervised probation and ordered to submit to therapy at a sexual offender treatment program at his own expense. (Pet. App. 4a). After attending

a number of counseling sessions, the respondent was informed that he would not qualify for the treatment program because he would not admit that he committed sexual assault on the seven-year old girl, the offense for which he had been charged and convicted. (Pet. App. 5a). The County Attorney petitioned the District Court for revocation of the respondent's suspended sentence. (Pet. App. 4a). At the subsequent revocation of probation proceeding in District Court, the program director testified that the respondent's denial that he committed an act of sexual misconduct made it impossible for him to treat the respondent in the program. (Pet. App. 6a). The District Court found the respondent in violation of his condition of probation, revoked his suspended sentence, and ordered him to serve five years in the Montana State Prison. (Pet. App. 7a).

The Montana Supreme Court on appeal of the respondent's revocation of probation concluded that the respondent had complied in every way with the condition requiring sex offender treatment except for his refusal to admit to guilt of the offense for which he had been convicted. (Pet. App. 8a, 9a). The court concluded that the respondent's revocation of probation based upon his denial of the offense was a penalty exacted for his refusal to incriminate himself. (Pet. App. 14a). The court reasoned that even though the respondent had already been convicted of the crime, under Montana law he retained the right to challenge his conviction. (Pet. App. 14a). An admission of guilt would nullify these rights. (Pet. App. 14a). The court further reasoned that since the respondent had already testified at trial to his innocence, an admission of guilt in a treatment program would subject him to prosecution for perjury. (Pet. App. 14a). As

a remedy, the Montana Supreme Court vacated the sentence and remanded for further proceedings. (Pet. App. 15a).

SUMMARY OF ARGUMENT

The Montana Supreme Court was incorrect in holding that revocation of probation based upon a probationer's refusal to admit to sexual assault in a sex offender treatment program required as a condition of probation was a penalty for the exercise of the probationer's Fifth Amendment rights. First, the context of the required admission did not reflect an attempt by the State of Montana to use the threat of probation revocation as a means to compel the respondent to incriminate himself in criminal proceedings. The essential purpose of the Fifth Amendment right is to guard against abuse of official power that unfairly shifts to the individual the government's burden of independent investigation. That purpose is not advanced when the right is held to apply in a context where there is an absence of official abuse.

Second, the State of Montana had a valid reason to insist upon compliance with treatment objectives because of the special needs of probation. Probation is a civil process, not a criminal process. Inquiry in a probation context does not constitute compulsion and, hence, change in the nature of supervision based on the probationer's responses may not be construed as a penalty for claiming a Fifth Amendment right. Moreover, the interests of effective probation supervision are undermined by the requirement that a state must adhere to the standards and protections of the criminal process.

Third, a required admission of potentially criminal conduct is a critical first step in addressing deviant risk behavior in a sex offender treatment program. In the absence of an admission of responsibility, there is no effective means to develop treatment strategies that will assist the respondent in avoiding future deviant conduct.

The application of the Self-Incrimination Clause of the Fifth Amendment to the treatment of sex offenders strikes an inappropriate balance between the hazards of unconstitutional state action and public safety because it penalizes states for adopting treatment strategies that require an admission of responsibility for deviant conduct.

ARGUMENT

THE MONTANA SUPREME COURT ERRED IN RULING THAT A REQUIRED ADMISSION TO SEXUAL ASSAULT IN A TREATMENT PROGRAM REQUIRED AS A CONDITION OF PROBATION AMOUNTED TO COMPULSION UNDER THE FIFTH AMENDMENT

A. Context of the Inquiry

The Fifth Amendment proscribes compulsion not inquiry. *United States v. Washington*, 431 U.S. 181, 187 (1977). A condition precedent to any finding of compulsion is that official action is brought to bear in an attempt to force a person to be a witness against himself in criminal proceedings. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). Reduced to its simplest terms, the purpose of the Fifth Amendment is to guard against a "tendency in human nature to abuse power." *Ullman v. United States*,

350 U.S. 422, 428 (1956). But it cannot be said that where a state embarks upon the rehabilitation of a person sentenced to probation, valid inquiry by the state in the course of the offender's treatment program must cease if the offender invokes the protections of the Fifth Amendment. Absent a context reflecting an abuse of official power, the Montana Supreme Court was in error holding that the state was penalizing the respondent for not incriminating himself. The court's error was not its recognition that the respondent's responses could be incriminating, but in its assumption that the choice available to the respondent amounted to compulsion.

This Court has made it clear that the Fifth Amendment prohibits compulsion, not the choice presented to the respondent in admitting to misconduct that is the subject of inquiry. *Cf. United States v. Washington*, 431 U.S. at 187; *McGautha v. California*, 402 U.S. 183 (1971). This Court has held that the Constitution "does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.' " *Jenkins v. Anderson*, 447 U.S. 231, 236 (1980) (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 30 (1973)). Compulsion, therefore, is not measured simply by the theoretical impact of the inquiry. This Court has held that the underlying purposes of the privilege against self-incrimination are implicated only when the official action in question reflects an abuse of power.

This Court has recognized that while the privilege addresses many values, it focuses primarily on the relationship between the government and the individual. It does so in two ways: (1) the prevention of inhumane

treatment of persons who are in possession of information sought by the government, and (2) the advancement of a notion of fairness. *Murphy v. Waterfront Commissioner*, 378 U.S. 52, 57, n.5 (1964). When the state is attempting to whipsaw the information required or needed in criminal proceedings through threatened or actual use of sanctions, these policies are clearly called into question.

This Court's ruling in *Lefkowitz v. Turley*, 414 U.S. at 78-79, is instructive on this point. The Court noted that while the Fifth Amendment provides that no person shall be compelled to be a witness against himself where the state is seeking information to be used in subsequent criminal proceedings. The Court accordingly ruled that the State could not compel testimony for use in grand jury proceedings by demanding waivers of immunity under threat of disqualification as public contractors. The penalty, in effect, arose from the context of state action. Similarly, the Court held in *Gardner v. Broderick*, 392 U.S. 273 (1968), that a public officer could not be discharged for refusing to sign a waiver of immunity after being subpoenaed by a grand jury and explained:

> It is clear that petitioner's testimony was demanded before the grand jury in part so that it might be used to prosecute him, and not solely for the purpose of securing an accounting of his performance of his public trust.

See Id. at 279.

Likewise, in *Sanitation Men v. Sanitation Commissioner*, 392 U.S. 280 (1968), the pending criminal investigation before a grand jury for three of twelve city employees undercut any claim that the city's investigation of abuse

in the Department of Sanitation and the subsequent questioning of the employees was solely in furtherance of a non-criminal objective. The Court emphasized:

> [I]t was clear that New York was seeking, not merely an accounting of their use or abuse of their public trust, but testimony from their own lips which could be used to prosecute them criminally despite the constitutional prohibition.

See Id. at 284. Clearly, compulsion arises in any context that demonstrates that official inquiry is intended to overcome free will to the benefit of a state criminal proceeding. But this Court has not taken the extra step implicit in the decision by the Montana Supreme Court that the privilege will forestall relevant state inquiry in the absence of compulsion.

This Court has not denied a state the ability to conduct relevant inquiry and to take appropriate action in the face of an individual's refusal to cooperate in that inquiry. *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977). So long as the state does not condition the exercise of its powers upon the relinquishment of the individual's privilege against self-incrimination in a criminal proceeding, the state may insist upon an accounting of public trust. *Minnesota v. Murphy*, 465 U.S. 420, 436, n.7 (1984); *Sanitation Men v. Sanitation Comm'r.* 392 U.S. at 284. The decisions pertaining to the interplay between the Fifth Amendment privilege and the state's attempt to pursue a valid inquiry have been characterized as both a "limit and a grant of power"[1] upon state action. In short,

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[1] *Asherman v. Meachum*, No. 90-2530, slip op. at 1691 (2d Cir. Feb. 13, 1992) (en banc). In *Asherman* the offender had been

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the State may pursue legitimate official inquiry, but it may not use the process of inquiry to force information from the lips of individuals in an attempt to prosecute them criminally.

The Montana Supreme Court failed to analyze the context of the State's inquiry, focusing entirely on speculative and theoretical implications of an admission by the respondent. But as discussed above, a determination of whether a state is exceeding its grant of power in pursuing a valid state interest primarily entails an examination of the context of state action.

This Court has not overlooked the contextual framework in determining if a state's inquiry amounts to compulsion for Fifth Amendment purposes. The Court's ruling in *Baxter v. Palmigiano*, 425 U.S. 308 (1976) exemplifies this point. Faced with a choice between fashioning a remedy along the lines of the *Gardner-Lefkowitz* group of decisions on one hand or one that deferred to the operational and practical considerations of maintaining discipline in prisons on the other, the Court let stand a Rhode Island prison procedure that permitted an inmate to

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sentenced to incarceration for manslaughter and was subsequently placed in a halfway house. When his parole was denied, the State ordered him to report for a psychiatric examination out of concern for his potential behavior and state of mind. Asherman refused upon advice of counsel. The State then returned him to confinement. The Second Circuit held that irrespective of his pending federal habeas corpus petition challenging the conviction, the State could terminate Asherman's home release status upon his refusal to answer questions about his crime. *Id.* at 1693.

remain silent at a disciplinary hearing, but permitted staff to draw an inference of guilt from his silence. The Court noted that Rhode Island prison authorities did not seek to make evidentiary use of the inmate's refusal to testify. The Court further observed that no criminal proceedings were pending when Palmigiano was provided the opportunity to testify. Although Justice Brennan's dissent underscored that the potential for evidentiary use of Palmigiano's statements in a criminal proceeding was present, the majority concluded that the state was not unfairly pitting its powers against the individual in an effort to avoid the burdens of independent investigation. The majority in *Baxter* reasoned:

> This does not smack of an invalid attempt by the State to compel testimony without granting immunity or to penalize the exercise of the privilege.

See Id. at 318.

Prohibited compulsion of speech should not focus on the theoretical implications of the responses. Yet, even in terms of the impact of any responses, this Court has repeatedly held that the Fifth Amendment privilege has no application where there is no realistic threat of a criminal proceeding. *Minnesota v. Murphy*, 465 U.S. at 435, n. 7. In short, the context of state action must include an assessment of the reality of state use of incriminating information at a criminal proceeding. No such assessment was made by the Montana Supreme Court.

The Montana Supreme Court's error was that it mischaracterized the sought-after admission of sexual assault as compulsion and vacated the respondent's resulting sentence of incarceration. The relief that the Montana

Supreme Court fashioned was not based upon the likelihood of criminal prosecution but the certainty of administrative action. In the absence of a context from which an intent to compel testimony could be made, the Court nonetheless treated the state's action as a penalty for invoking the privilege. While this broad and entirely unnecessary prohibition of valid state action does little to advance the purposes of the Fifth Amendment, it does force the State of Montana to abandon treatment in a community setting. It is highly questionable that this set of circumstances strikes an appropriate balance between the hazards of unconstitutional state action and the protection of other important values such as public safety and successful treatment of sentenced offenders.

B. Probation as a Civil Process

The Montana Supreme Court does not indicate whether it accorded any importance to the fact that the respondent was on probation. But in assessing whether the state proceedings in question implicate the Fifth Amendment's guarantee against compulsory self-incrimination, there must be an examination of the civil or criminal nature of the proceedings at issue. *Allen v. Illinois*, 478 U.S. 364 (1986).

It is clear under prior decisions by this Court that probation is essentially civil in nature. In *Griffin v. Wisconsin*, 483 U.S. 868, 876 (1987), this Court remarked that probation serves as a period of genuine rehabilitation. This Court also observed that while probation is a form of criminal sanction imposed by a Court after conviction, it

retains more of the characteristics of a civil proceeding than a criminal one. Clearly, revocation of probation is not part of criminal prosecution. *Gagnon v. Scarpelli*, 411 U.S. 781 (1973). Even though probationers risk incarceration when confronted with a charge of violating a condition of probation, that possibility does not per se mandate the application of the Sixth Amendment's right to counsel and confrontation to the degree of a defendant in a criminal proceeding. Likewise, a probationer under supervision in the community is not entitled to the same rights of privacy under the Fourth Amendment as enjoyed by unconvicted citizens. *Griffin v. Wisconsin*, 483 U.S. at 875. The special needs of the state in protecting the public from sentenced offenders under supervision in the community justify departure from the usual warrant and probable cause requirements. As the Court in *Griffin v. Wisconsin* explained:

> In such circumstances it is both unrealistic and destructive of the whole object of the continuing probation relationship to insist upon the same degree of demonstrable reliability of particular items of supporting data, and upon the same degree of certainty of violation, as is required in other contexts.

See Id. at 879.[2]

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[2] Analogously, the Court has ruled that regulations impinging on the constitutional rights of inmates are themselves constitutional so long as they are reasonably related to legitimate penological interests. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987) (citing *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

Given the essentially civil nature of probation and the strong rehabilitation purposes probation serves, the possible criminal implications of the respondent's admission does not implicate the Self-Incrimination Clause of the Fifth Amendment. This Court noted in *Allen v. Illinois*, 478 U.S. at 370, 375, that inclusion of the Fifth Amendment in state proceedings that deal with sexually dangerous persons did not serve the underlying purposes of the privilege because the express policy of the Illinois legislation[3] is to address treatment not the traditional aims of punishment peculiar to criminal proceedings. The essential purposes to be served by relevant inquiry in probation supervision are functionally indistinguishable from the benign purposes addressed by the Illinois legislation. That inquiry requires the supervising officials to know where the probationer is living, his occupation, life habits, personal associations, and whether the probationer is in compliance with the criminal laws. This necessitates a degree of intrusion that is peculiar to probation and entirely unlike the relationship between the state and its citizens. The inquiry is not designed to enhance enforcement of the laws of the state, but to "' help individuals reintegrate into society as constructive individuals as soon as they are able . . . ' ". *Gagnon v. Scarpelli*, 411 U.S. at 783 (quoting *Morrissey v. Brewer*, 408 U.S. 471 at 477 (1972)).

Moreover, the practical difficulties and delays inherent in the grants of testimonial or use immunities[4] by state officials would unduly impact on the effective supervision of probationers. Cf. *Griffin v. Wisconsin*, 483

U.S. at 879 (warrant requirement for searches of probationers would reduce deterrent effect of effective supervision). But more importantly, aside from these pragmatic considerations it makes little sense to superimpose a Fifth Amendment protection where the state's express intent is to use the results of the inquiry solely to enforce the conditions of probation.

C. The Need For Treatment

Although it is clear that treatment considerations were entirely the focus of the State of Montana's requirement for an admission of sexual assault, the Montana Supreme Court failed to analyze the treatment context of the sought-after admission of the respondent. By so doing it disregarded entirely the state's express interest in treating a convicted sex offender. That court's failure to recognize the necessity for offenders to admit to the acts for which they have been convicted nullifies an acceptable

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[3] Illinois Sexually Dangerous Persons Act, Ill. Rev. Stat., Ch. 38, Paras. 105-1 - 105-12 (1985).

[4] See e.g., *Kastigar v. United States*, 406 U.S. 441, 461-462 (1972) (United States can compel testimony from witness who invokes Fifth amendment by conferring testimonial immunity).

treatment methodology for sex offenders[5] and potentially places state citizens at additional risk.

In a larger context, the decision by the Montana Supreme Court strikes at the concept of federalism acknowledged by this Court in *Allen v. Illinois*, 478 U.S. at 364. Without an effective and valid means of treating convicted sex offenders, the state would be forced to either incarcerate all sex offenders in order to provide a setting that guarantees public safety or permit untreated sentenced offenders to remain in the community in probation status. If the essence of federalism is freedom to develop solutions to contemporary problems, that purpose is not served by the rigid application of constitutional protections that address different concerns. Inasmuch as the Fifth Amendment provides a barrier to a state procedure characteristic of an inquisitorial system,

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[5] Admission of the deviant criminal act is recognized as the basis for successful sex offender treatment.

> Regardless of the form that denial takes, treatment for a propensity toward sexual aggression cannot take place until the offender at least acknowledges that the abuse occurred. An individual cannot be helped to deal with a problem until he admits one exists. Therefore, gaining the offender's admission is necessary if an adequate clinical interview is to proceed.

W.D. Pithers, L.S. Beal, J. Armstrong, J. Petty, *Identification of Risk Factors Through Clinical Interviews and Analysis of Records*, in *Relapse Prevention with Sex Offenders*, (D. Laws, ed. 1989), at 83.

the application of the Fifth Amendment in a purely treatment context threatens to displace a scientifically acceptable method of rehabilitation.

CONCLUSION

The judgment of the Montana Supreme Court should be reversed.

Respectfully submitted,

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